

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE LEE FORD, JR.,

Defendant-Appellant.

UNPUBLISHED

July 2, 1999

No. 204295

Kalamazoo Circuit Court

LC No. 96-000898 FC

Before: Hoekstra, P.J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to ten to forty years' imprisonment for the armed robbery conviction and a consecutive two-year term for the felony-firearm conviction. He appeals. We affirm.

Defendant first contends that the trial court erred by refusing his request for a pretrial lineup after the sole victim identified him at a photographic showup soon after the crime. The trial court may, in the exercise of its discretion, grant a defendant's motion for a lineup. *People v Gwinn*, 111 Mich App 223, 249; 314 NW2d 562 (1981). In the case at bar, the victim recognized defendant during the robbery as a friend of a former co-worker, and promptly and unequivocally selected him from a subsequent photographic array. At the hearing on his motion, defendant never challenged the manner in which the photographic showup was prepared or presented and never claimed that it was in any way suggestive or tainted. Furthermore, the record in this case furnishes no evidence of impropriety. The trial court therefore did not abuse its discretion by denying defendant's request for a corporeal lineup.

Defendant next argues that prejudicial error occurred when the trial court allowed plaintiff to impeach him at trial with a 1987 conviction for larceny in a building. We disagree. Although the trial court's analysis of the factors governing admission of impeachment evidence, MRE 609; *People v*

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Allen, 429 Mich 558, 606; 420 NW2d 499 (1988), was imperfect, no prejudicial error occurred because the conviction was admissible even under a proper analysis.

Defendant challenges as improper plaintiff's trial questioning of his girlfriend about her reaction to information that he was driving without a driver's license and had her nine-year-old son with him during a high-speed automobile flight from police. We perceive no error. Defendant's girlfriend was living with him at the time of the crime and testified extensively regarding her purported knowledge of him, his behavior, and his habits. To ascertain her familiarity with defendant's alleged propensity for risk-taking, plaintiff interrogated her about her awareness of the matters in question. This line of inquiry was legitimate. Defendant failed to object at trial to plaintiff's rebuttal argument based on the girlfriend's testimony, and that issue has therefore not been preserved for review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant also argues that the trial court erred by admitting into evidence as an excited utterance the victim's statement to the store manager that she recognized defendant as one of the robbers. The trial court found that this statement was made within 1-1/4 hours of the robbery and while the victim was still under extreme stress. This Court reviews a trial court's determination of evidentiary issues for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998).

MRE 803 and 803(2) provide that a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is "not excluded by the hearsay rule." The requirements for an excited utterance are (1) the existence of a startling event, and (2) a resulting statement made while the declarant is under the excitement caused by the event. *Smith, supra* at 550; *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). "[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Smith, supra* at 551. Because the evidence in the present case reveals that the victim appeared stressed and upset throughout the time the manager was with her and was shaking and crying much of that time, the trial court did not abuse its discretion in ruling the statement admissible.

We need not consider defendant's contention that the trial court erred by failing to instruct the jury regarding the alleged unreliability of eyewitness identification. Defendant has not preserved this issue for review by raising it at trial, and no manifest injustice will result from our failure to consider it. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Kelly*, 423 Mich 261, 271-272; 378 NW2d 365 (1985); *People v McVay*, 135 Mich App 617, 618; 354 NW2d 281 (1984).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns